Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1979

No. 80-146

JOEL SHIFFRIN, ET AL., *Petitioners,*

v.

EARL BRATTON, ET AL., *Respondents.*

FIRST NATIONAL BANK OF HIGHLAND PARK,
A National Banking Association, *Petitioners,*

v.

ROGER CHAPMAN and JEANNE CHAPMAN,
Individually, and On Behalf of All Others
Similarly Situated, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH COURT

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS R. MEITES, ESQ.
135 South LaSalle Street
Chicago, Illinois 60603
KENNETH F. LEVIN, ESQ.
11 South LaSalle Street
Chicago, Illinois 60603
Attorneys for Respondents
EARL BRATTON, et al.

CHRISTOPHER A. BLOOM, ESQ.
Sears Tower, Suite 7818
233 South Wacker Drive
Chicago, Illinois 60606
Attorney for Respondents
ROGER CHAPMAN and
JEANNE CHAPMAN

Of Counsel:
MEITES, FLAXMAN & FRACKMAN
BEATTY, LEVIN, HOLLAND, BASOFIN & SARSANY
FOX & GROVE, Chartered

The Respondents, Earl Bratton, et al. and Roger Chapman and Jeanne Chapman, jointly, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit's decision.

QUESTION PRESENTED

Whether the court of appeals on remand from this Court properly applied *Touche Ross & Co.* v. *Reddington* 442 U.S. 560 (1979), and *Cort* v. *Ash,* 422 U.S. 66 (1975), in determining that an implied private right of action exists in favor or respondents who prepaid for charter air transportation pursuant to provisions of the Federal Aviation Act and related regulations and who received neither the transportation nor a refund because of violation of the Act and its regulations.

OPINIONS BELOW

These two cases, which are the subject of the petition here, were consolidated for appeal by the Seventh Circuit. The court of appeals has written two opinions on the question presented here: the first on appeal from the district court is reported at 585 F. 2d 223 (7th Cir. 1978), reh. den. Jan. 11, 1979; the second, after this Court vacated that opinion and remanded for further consideration [443 U.S. 903 (1979)], is not yet reported. The second decision of the court of appeals in these cases was entered on March 10, 1980. Petitioners' motion for rehearing and rehearing en banc of the second decision was denied on briefs on June 12, 1980. The opinion of the district court is reported at 440 F. Supp. 1257 (N.D. Ill. 1977).

STATEMENT IN OPPOSITION

The writ should be denied because the decision below is not in conflict with any decision of this Court or any other court of appeals decision. Respondents are disappointed

travelers and travel agents who prepaid for charter tours that were cancelled when the tour operators were declared bankrupt. The petitioners were responsible for the custody and maintenance of respondents' prepayments under regulations issued by the Civil Aeronautics Board (CAB) pursuant to section 401(n)(2) of the Federal Aviation Act (FAA), 49 U.S.C. § 1371(n)(2). The regulations, called the "Special Charter Regulations," imposed stringent safeguards on the handling of tour prepayments. 14 C.F.R. Part 378; 14 C.F.R. Part 378a (1976).[1] By federal law these prepayments were to be paid to and held in an escrow account with a depository bank until either the tours were provided or cancelled, (14 C.F.R. § 378.16(b), 378a.31(b)), and in the event of cancellation the prepayments were to be refunded directly to tour participants by the petitioners. 14 C.F.R. §§ 378.16(b)(iv), and 387a.31(b)(iv).

Pursuant to the Special Charter Regulations, petitioners First National Bank of Highland Park and its vice-president Joel Shiffrin agreed, at the request of the tour operators, to be the depository of respondents' funds, undertaking to safeguard and, if necessary, to refund the prepayments. When the tour operators were found bankrupt and the tours were cancelled, the petitioners were holding insufficient funds in the depository escrow account to refund respondents' prepayments in full.

Respondents brought suit against petitioners and others for, among other things, violation of the Special Charter

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[1] The Special Charter Regulations have since been revoked and replaced by "Public Charter Regulations." 43 Fed. Reg. 36603 (August 18, 1978). The new regulations eliminate the requirement of prepayment as a condition for tour participants receiving the lower charter fares from tour operators. 43 Fed. Reg. 36604 (August 18, 1978).

Regulations, including petitioners' failure to segregate and protect respondents' prepayments. The district court in a single decision dismissed the action on the grounds that respondent tour participants had no right of action to enforce obligations under the Special Charter Regulations. *Sub nom. Chapman* v. *First Nat'l Bank,* A. 1-15, 440 F. Supp. 1257 (N.D. Ill. 1977). The Seventh Circuit reversed, *Bratton* v. *Shiffrin,* A. 16-34 585 F. 2d 223 (7th Cir. 1978). After an exhaustive analysis of the operation of the regulations, their legislative history, consideration of the CAB's ability and authority to take adequate action to remedy the precise wrong which Congress sought to prevent and the inability of other forums to provide effective relief, the court below concluded that pursuant to *Cort* and its progeny a private right of action existed in favor of the respondents. A 30-31, 585 F. 2d at 232.

Petitioners' motion for rehearing and rehearing *en banc* was denied on briefs, and a petition for Writ of Certiorari followed. On June 25, 1979 this Court summarily granted petitioners' petition for Certiorari and vacated and remanded the case for "consideration in light of *Touche Ross & Co.* v. *Reddington,* 442 U.S. 560 (1979)." 443 U.S. 903 (1979).

Having given consideration to the Court's decision in *Touche Ross,* on March 10, 1980 the Seventh Circuit in an entirely new decision again reversed in the district court and found a private right action in the statutory section. A 37. The opinion, by Judge Swygert, reviewed the legislative history of the relevant portions of the FAA, relying in part upon new materials presented by the CAB which on remand had filed a Statement of Position as Amicus Curiae in support of respondents' position. The court stated, A 43:

> Although the result reached here is different from the one reached in *Touche Ross,* the analysis is consistent with that used in *Touche Ross* and *Cannon* and the result is compelled by the entirely different factual situation presented. Congress was shown the problems which had been caused by the insolvency of travel agents and enacted a provision to give rights to specific individuals.

Plaintiffs respectfully submit that the opinion on remand of the Seventh Circuit is not in conflict with any decision of this Court, or any court of appeals. Accordingly, the petition should be denied.

REASONS FOR DENYING THE WRIT

I. The Decision of the Court of Appeals Was Faithful to and Consistent with the Decisions of This Court.

This case, in which the court of appeals followed established precedent of this Court in implying a cause of action in favor of respondents, raises no questions that merit this Court's review.

This court's decision on remand in this matter is consistent with the decisions of the Supreme Court both in *Touche Ross* v. *Reddington,* 442 U.S. 560 (1979), and *Cort* v. *Ash,* 422 U.S. 66 (1975).

In determining that respondents have a cause of action under section 401(n) of the Federal Aviation Act, the Seventh Circuit on March 10, 1980 followed *Touche Ross* and inquired into whether Congress intended to create a private cause of action by examining the language and focus of the statute, its legislative history, and its purpose. 442 U.S. at 568. As a result of this inquiry, the court determined that section 401(n) of the Federal Aviation Act "was designed specifically to provide an enforceable remedy to individual air charter travelers against insolvent tour operators by providing compensation for their loss from a financially responsible third party." A 38-39.

The Seventh Circuit looked to the express language of section 401(n), which provides for a performance bond or equivalent security arrangement "in order to protect travelers . . . by aircraft" against the specific wrong suffered by the plaintiffs: "the inability to obtain compensation when tour plans collapse." A40. From this language the court held that the stated purpose of section 401(n) of the FAA, "is to provide 'appropriate compensation to such travelers, and shippers'." A 40-41.

Further, the Seventh Circuit examined the legislative history of section 401(n) and found that "in enacting section 401(n)(2) Congress intended to provide a remedy against a third party for travelers when agreements for air transportation were breached." A 40. The panel on remand had additional historical legislative analysis provided by the Civil Aeronautics Board, which was permitted to file a position statement as amicus curiae. A 41. In that statement the CAB provided an extensive legislative history of section 401(n), demonstrating that Congress had been shown the evils which had arisen in the travel agency business and the consequences of agency insolvency, namely, cancelled trips after payment had been made, the stranding of passengers in foreign countries and the failure to supply guaranteed accommodations, and that Congress had responded by enacting a security provision to compensate aggrieved travelers and shippers. A 40-41. *See also* 108 Cong. Rec. 3707, 12284. The circuit court looked specifically to the testimony of the Administrator of the Federal Aviation Agency before the Senate Subcommittee on what became section 401(n). Senate Hearings on proposed amendments to the House Substitute Amendment to S. 1969, before the Aviation Subcommitte of the Senate Committee on Commerce, 87th Cong., 2d Sess. 103 (March 5, 1962), at 34-35. From this history of the enactment of the relevant portions of section 401(n), the circuit court found "the indication of congressional in-

tent which the Supreme Court found wanting in the general bookkeeping and record keeping provisions reviewed in *Touche Ross.*" A 41.

As they have throughout, petitioners again argue in their current petition that because of the presence of an express private remedy in another part of the Federal Aviation Act, no cause of action can be implied under any other provision. This contention was considered and rejected by the court of appeals. A 42-43. The court examined the only express private remedy found in the entire Federal Aviation Act, section 1007 (49 U.S.C. § 1487), noting that it was not created contemporaneously with section 401(n)(2) of the Federal Aviation Act nor did Congress refer to it when delimiting the scope of the right created in section 401(n)(2). Section 1007 was, in fact, adopted unchanged from the Civil Aeronautics Act of 1938. 1958 U.S. Code Cong. & Ad. News 3741, 3758. Rather than an intention to deny travelers a private remedy, section 401(n) was enacted in response to Congressional concern with the plight of uncompensated travelers. A 26, 585 F.2d at 230. In *Touche Ross,* in contrast this Court found express private rights of action in four different sections of the Act, two preceding consideration that under the two following provisions and, all of which were enacted contemporaneously. The Court therefore concluded that "when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly." 442 U.S. 572. Similarly, in *Transamerica Mortgage Advisors, Inc.* v. *Lewis* 444 U.S. 11, (1979), this Court found contemporaneous enactments expressing a comprehensive legislative plan.

The reasoning below is not in conflict with the rationale of the decisions in *Securities Investor Protection Corp.* v. *Barbour,* 421 U.S. 412 (1975) ("SIPC"), and *National Railroad Passenger Corp.* v. *National Association of Rail-*

road Passengers, 414 U.S. 453 (1974) ("AMTRAK"), and in particular with the application in those cases of the doctrine of *expressio unius.* This maxim at best is merely an aid to statutory construction, and an unreliable tool with which to discern legislative intent at that. See, 77 *Harv. L. Rev.* 285, 289-91 (1963). The application of that maxim in these cases does not demand its rote application here. Its role, if any, depends on the particular statute under scrutiny.

The Seventh Circuit's conclusion that the existence of an express statutory remedy in another context was not determinative of whether other private remedies were intended to be excluded is in fact the same conclusion reached by this Court in *Cort* v. *Ash,* (422 U.S. at 82, n. 14). As this court stated in *Cannon* v. *University of Chicago,* 441 U.S. 677, 711 (1979):

> [T]he Court has generally avoided this type of "excursion into extrapolation of legislative intent," unless there is other, more convincing, evidence that Congress meant to exclude the remedy. (citation omitted.)

The Seventh Circuit thoroughly examined the language of section 401, its legislative history and its purpose and properly determined that although the statute may not have expressly provided a private cause of action, one should be implied.

* * *

The four tests set out in *Cort* were faithfully and conventionally applied by the Seventh Circuit, and although this Court has never deemed it necessary for all four factors to be present, all four, as the court of appeals found on remand, have been met in this case.

Applying the first factor of the *Cort* analysis, the Seventh Circuit found (a point not disputed by petitioners here) that the purpose of section 401(n)(2) and the Special

Charter Regulations is to protect travelers, such as respondents, from the specific injury set out in the respondents' complaint: their inability to obtain refunds of their prepayments when their charter tours were cancelled. A. 23-25, 585 F.2d at 228, 229. Thus, the respondents are members of the class for whose "especial benefit" section 401(n)(2) of the FAA was enacted.

Applying the second *Cort* factor, the Seventh Circuit thoroughly analyzed the statute, regulations and their legislative history. The court found:

> that in enacting section 401(n)(2) Congress intended to provide a remedy against a third party for travelers when agreements for air transportation were breached. 585 F.2d at 229. The provision declares that the purpose of the security arrangements is to provide "appropriate compensation to such travelers and shippers." Congress had been shown the evils which had arisen in the travel agent business and the consequences of agency insolvency, namely, cancelled trips after payment had been made, the stranding of passengers in foreign countries, and the failure to supply guaranteed accomodations, and had enacted a security provision to compensate aggrieved travelers and shippers. A 40-41.

The statutes involved in SIPC and AMTRAK provide for a clear remedy by an agency for the particular wrong. In contrast the court of appeals in this case explicitly found the CAB's enforcement authority under section 107(a), 49 U.S.C. § 1487(a), questionable and that it was admittedly unable to enforce the legislative scheme. A. 27-28, 585 F.2d at 230-231. The Seventh Circuit's conclusion that the existence of an express statutory remedy in one context was not determinative of whether other private remedies were intended to be excluded, is in fact the same conclusion reached by this Court in *Cort* v. *Ash*, 422 U.S. at 82, n. 14.

Applying the third *Cort* test, the court below considered whether the implication of a private action was consistent

with the underlying purpose of the legislative scheme in question. Having already determined that the purpose of the legislation in question was to protect travelers from economic loss, the court considered whether the CAB had the ability to enforce the regulations. The Seventh Circuit was mindful of this Court's admonition in *Cort* that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." A. 26, 585 F.2d at 230, citing *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964). Since it was clear to the Seventh Circuit in light of the CAB's explicit representations both to the district court and then as *amicus curiae* on remand that it could not as a practical matter enforce the regulations, and since it was doubtful that the CAB even had the statutory authority to recover the prepayments requested by respondents if the CAB elected to attempt enforcement, the court properly concluded that it was consistent with the underlying purpose of the legislative scheme to imply a private action in favor of respondents to recover their prepayments.

> [I]n a case such as this, where practical limitations are combined with a clear possibility that agency action may never be adequate to remedy the precise wrong which Congress sought to prevent, we think that a federal court must be willing to permit private remedial measures to better effectuate compliance with federal goals.

A. 27, 585 F.2d at 230.

Finally, the Seventh Circuit thoroughly considered the fourth *Cort* factor, determining that a federal forum was appropriate because the case is not one traditionally relegated to state law. Regulation of air travel, unlike regulation of corporations and the sale of their securities, is not an area where Congress is overlapping federal statutes upon a preexisting state scheme. Rather, since the onset of commercial aviation, pervasive federal regulation has preempted state law. *City of Burbank* v. *Lockhead Air Terminal, Inc.,* 411

U.S. 624, 633-635 (1973); *Northwest Airlines* v. *State of Minnesota*, 322 U.S. 292, 303-304 (1944) (Jackson J., concurring). Cf. *British Airways Bd.* v. *Port Auth.*, 558 F.2d 75, 84 (2d Cir. 1977); *Village of Bensenville* v. *City of Chicago*, 16 Ill. App.3d 733, 738, 306 N.E.2d 562, 566 (1973); *LaSalle National Bank* v. *County of Cook*, 34 Ill. App.3d 264, 279 340 N.E.2d 79, 90-91 (1975). The court of appeals reasoned that although respondents' causes of action were not inconsistent with common law theories of liability, essential elements of each of those theories are based on duties created by federal law, namely the Federal Aviation Act and the Special Charter Regulations. Since the petitioner's duties and possible defenses can be determined only by the Act and the regulations, the court below correctly viewed respondents' causes of action as rooted in federal law, and, recognizing the need for uniformity of interpretation of that law, properly determined that a federal forum was more appropriate for the trial of these issues. A. 29-30; 525 F.2d at 232.

II. The Court of Appeals' Decision Is Not in Conflict with Any Decision of Other Circuits or of the Seventh Circuit

Petitioners suggest that the ruling below conflicts with three Third Circuit decisions, *Polansky* v. *Trans World Airlines, Inc.*, 523 F.2d 332 (3d Cir. 1975), *Rauch* v. *United Instruments, Inc.*, 548 F.2d 452 (3d Cir. 1976), *Wolf* v. *Trans World Airlines, Inc.*, 544 F.2d 134 (3d Cir. 1976), *cert. denied*, 430 U.S. 915 (1977), each of which dealt with other sections of the Federal Aviation Act. It is true that the result in this case differs from that in *Polansky, Rauch* and *Wolf*, but difference in result alone certainly cannot be considered a "conflict." Most importantly, the substantive holdings of those cases are not inconsistent with the holding here. Each

of the above cases turned on the application of the first *Cort* test to other sections of the FAA, and in each of those cases the court denied a private remedy because it found that the plaintiffs did not suffer the type of injury the statute was intended to prevent.[2] In this case, in contrast, it is clear that the type of injury suffered by respondents was the exact injury section 401(n) were intended to prevent.

III. This Case Is Not Yet Ripe for Review in This Court.

This case has not yet proceeded as far as an answer to the complaint. All discovery was stayed at the outset of the litigation, and the case was dismissed by the district court. The court of appeals has reversed the case and remanded it to the district court. All proceedings are still stayed pending the disposition on this petition for certiorari. This proceeding below is currently interlocutory. In this posture a grant of certiorari may well be premature. See, e.g., Stern & Gressman, *Supreme Court Practice* (5th ed. 1978) at § 4.19, 300-302 and cases cited therein.

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[2] In *Polansky* the purpose of statute was to insure free access to air transportation facilities; plaintiffs who, under § 404 of the Act, 49 U.S.C. § 374(b), claimed to have been furnished inferior ground accommodations in connection with a flight, were held not to be within the class for who especial benefit the statute was enacted. In *Rauch*, plaintiffs, who claimed to have suffered economic loss due to the purchase of faulty altimeters, were not within the class of persons intended to be protected by § 601, 49 U.S.C. § 1421, and regulations, the purpose of which was to insure the physical safety of travelers. In *Wolf*, plaintiffs, who were forced to forfeit free guest accommodations because of the deceptive practices of an airline, were denied a private rights of action under § 403, 49 U.S.C. § 1373(b), because the statute at issue was designed to implement tariff regulations and not prevent the type of injury suffered by plaintiffs.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

August 31, 1980

THOMAS R. MEITES, ESQ.
135 South LaSalle Street
Chicago, Illinois 60603

KENNETH F. LEVIN, ESQ.
11 South LaSalle Street
Chicago, Illinois 60603
Attorneys for Respondents
EARL BRATTON, *et al.*

CHRISTOPHER A. BLOOM, ESQ.
Sears Tower, Suite 7818
233 South Wacker Drive
Chicago, Illinois 60606
Attorneys for Respondents
ROGER CHAPMAN and
JEANNE CHAPMAN

Of Counsel:

THOMAS R. MEITES, Esq.
Meites, Flaxman & Frackman
135 South LaSalle, Suite 2319
Chicago, Illinois 60603

KENNETH F. LEVIN, Esq.
Beatty, Levin, Holland, Basofin & Salsay
11 South LaSalle, Suite 2200
Chicago, Illinois 60603

CHRISTOPHER A. BLOOM, Esq.
Fox & Grove, Chartered
Sears Tower, Suite 7818
233 South Wacker Drive
Chicago, Illinois 60606